PUBLIC PROSECUTOR

v.

ZULKIFFLEE HASSAN

SUPREME COURT, KUALA LUMPUR
HASHIM YEOP SANI CJ (MALAYA)
AJAIB SINGH SCJ
GUNN CHIT TUAN SCJ
[SUPREME COURT CRIMINAL APPEAL NO. 05-86-89]
20 APRIL 1990

CRIMINAL PROCEDURE: *Jurisdiction - High Court - Section 389 of the Criminal Procedure Code - Discretion of the Court - Release of passport - Bailable offence - Section 394 of Criminal Procedure Code.*

The respondent was charged with seven counts of criminal breach of trust under s. 409 of the Penal Code. He was convicted and sentenced to a total of 6½ years imprisonment. He applied for a stay of execution of his sentence pending his appeal against conviction and sentence. At the hearing of the application the Court allowed bail of RM200,000 and ordered the respondent to surrender both his international and restricted passports.

The respondent then made applications to the High Court and Sessions Court for the release of his passport; these applications were dismissed. The respondent then applied to the High Court for the release of his passport pursuant to s. 389 of the Criminal Procedure Code (CPC). Despite objections by the prosecution as to the power of the High Court to exercise its jurisdiction under ss. 389 and 394 of the CPC, the High Court granted the respondent's application. The appellant now appeals to the Supreme Court on the ground that the learned Judge of the High Court erred in law and on facts in holding that the High Court had jurisdiction to entertain the respondent's application under s. 389 of the CPC.

Held:

[1] Section 389 of the CPC is concerned with the amount of bond executed by a person released on bail under Chapter XXXVIII of the CPC.

[2] The discretionary power of the Court to admit to bail is not arbitrary, but is judicial and is governed by established principles. It is established that the Courts have to consider the seriousness of the charge, the nature of the evidence, the severity of the punishment prescribed, the character, means and status of the accused, the penal consequences of the act if proved and whether the offence charged is bailable.

[3] It is obvious that under s. 389 of the CPC a Judge has jurisdiction to consider an application under the said section and the words "in any case" import that the powers of the High Court are unfettered. The High Court has the fullest discretion in the matter when considering the amount of the bond and the words "whether there be an appeal on conviction or not" in the section gives the Judge very wide powers to admit to bail even an accused person has been convicted and has not appealed. Therefore where a man convicted has not preferred an appeal bail may be granted pending the filing of the appeal.

[4] As neither Counsel for the appellant nor the respondent addressed the Court on whether the learned Judge had the power to order the release of the respondent's passport under s. 389 of the CPC, that issue is left to be decided on some other occasion.

[Appeal dismissed.]

Case referred to:
Sulaiman bin Kadir v. Public Prosecutor [1976] 2 MLJ 37

Legislation referred to:
Criminal Procedure Code, ss. 389, 394
Penal Code, s. 409

For the appellant - Gooi Soon Seng, DPP
For the respondent - Muhammed Shafee; M/s. Shafee & Co.

JUDGMENT

Gunn Chit Tuan SCJ:

The Public Prosecutor, Malaysia, filed a notice of appeal on 5 September 1989, in which it was stated that the appeal was "against the decision of the honourable Mr. Justice Dato' Shaik Daud b. Haji Ismail given at Kuala Lumpur on 4 September 1989, allowing the release of the above named respondent's international passport under s. 389 of the Criminal Procedure Code" which reads as follows:

> 389. The amount of every bond executed under this chapter shall be fixed with due regard to the circumstances of the case as being sufficient to secure the attendance of the person arrested, but shall not be excessive; and a Judge may, in any case, whether there be an appeal on conviction or not, direct that any person be admitted to bail or that the bail required by a police officer or Court be reduced or increased.

In the petition of appeal to this Court there was six grounds of appeal, but before us Mr. Gooi Soon Seng, Deputy Public Prosecutor, indicated that he was only proceeding on the following one ground of appeal:

> 10.5 The learned Judge erred in law and on facts in holding that the High Court has jurisdiction to entertain the respondent's application under s. 389 of the Criminal Procedure Code.

Before us the complaint was therefore not against the decision of the learned Judge in ordering the release of the respondent's international passport, but rather against the decision of the High Court in holding that it had jurisdiction to entertain the respondent's application under s. 389 of the Criminal Procedure Code.

The facts of this case were set out in the said petition of appeal. In it was stated that Zulkifflee bin Hassan, the respondent, was charged in Arrest Case Nos. 74-49/55-87 on 20 April 1987, before the Sessions Court at Kuala Lumpur on seven counts of criminal breach of trust under s. 409 of the Penal Code. He was convicted on 29 July 1989, and sentenced to a total of 6½ years imprisonment to run concurrently and had thereupon applied for a stay of execution of his sentence pending appeal against conviction and sentence. After having heard the application of the respondent and the objections raised by the prosecution, the Sessions Court allowed bail of RM200,000 with two sureties and as a condition to the bail ordered the respondent to surrender both his international and restricted passports to the Court with liberty to apply as and when the need arises.

On 30 August 1989, the respondent applied by way of a miscellaneous criminal application to the High Court, Malaya, at Kuala Lumpur for the release of his international passport. That application was dismissed by the High Court on the ground that the application should be properly made to the Sessions Court Judge, who had granted the bail and made the order to surrender the said passport with liberty to apply. On the same day pursuant to the High

Court decision the respondent applied to the Sessions Court for the release of his passport by way of a notice of application. After hearing arguments by the respondents has the prosecution, the Sessions Court Judge dismissed the application.

On 4 September 1989, the respondent applied again to the High Court for the release of his passport by way of a notice of motion under s. 389 of the Criminal Procedure Code. At the outset of the hearing of that application the prosecution raised a preliminary objection on two grounds, namely, that the High Court had no jurisdiction to entertain the application under s. 389 of the Criminal Procedure Code because the application was in similar terms to the application which was dismissed earlier on by the Sessions Court and that the application to vary that order of the subordinate Court should be made under s. 394 of the Criminal Procedure Code which is as follows:

> 394. Appeal.
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> Any person aggrieved by any order or refusal of any inferior Court made under this chapter may appeal to the High Court, which may confirm, vary or reverse the order of such inferior Court.

The other ground of objection was that s. 389 of the Criminal Procedure Code concerns the exercise of the High Court of its original jurisdiction. The High Court Judge however ruled that the High Court had jurisdiction to entertain the said application under s. 389 of the Criminal Procedure Code and after hearing both parties allowed the application and ordered that the applicant "surrender his passport to the Court within 48 hours of his arrival".

Before us the learned deputy pointed out that the Sessions Court in this case had allowed bail to the respondent. He referred to *Sulaiman bin Kadir v. Public Prosecutor* [1976] 2 MLJ 37 in which case Harun J (as he then was) had expressed the view that "if a person should not be kept in custody for a moment longer than is necessary, then the speedy procedure of s. 389 of the Criminal Procedure Code rather than that of an appeal was obviously indicated." In that case the Sessions Court had refused bail and the High Court held that as there were exceptional and special reasons the Court could exercise its discretion under s. 389 and granted bail. The learned deputy contended that case was not applicable as this case was different because the respondent had already been granted bail and the High Court therefore had no jurisdiction to entertain the respondent's application under s. 389 of the Criminal Procedure Code.

Encik Muhammad Shafee, Counsel for the respondent, also referred to s. 389 of the Criminal Procedure Code and *Sulaiman bin Kadir v. PP* (*supra*) and pointed out that the learned Judge in this case had stated in his grounds of judgment that the Sessions Court Judge without making an order one way or the other had said that she refused to exercise her discretion concerning the application for the release of the respondent's international passport. Counsel pointed out that the issue in this case before this Court was whether the High Court had jurisdiction to consider the application under s. 389 of the Criminal Procedure Code. He referred to the words "and a Judge may, in any case, whether there be an appeal on conviction or not" appearing in s. 389 of the Criminal Procedure Code and contended that the High Court therefore had jurisdiction to consider the application under that section of the Criminal Procedure Code.

In reply the learned Deputy stated that he was not contending that the High Court did not have concurrent jurisdiction to consider an application under s. 389 of the Criminal Procedure Code where the amount of bond was concerned but repeated his contention that the learned Judge in this case only had jurisdiction to consider an appeal under s. 394 of the Criminal Procedure Code and not an application under s. 389 of the said Code.

For a start we considered that it should be borne in mind that s. 389 of the Criminal Procedure Code is concerned with the amount of bond executed by a person released on bail under Chapter XXXVIII of the said Code. That section specifies that when a man who is arrested, is not accused of a non-bailable offence, no needless impediment should be placed in the way of his being admitted to bail. The discretionary power of the Court to admit to bail is not arbitrary, but is judicial, and is governed by established principles. It is established that the Courts have to consider the seriousness of the charge, the nature of the evidence, the severity of the punishment prescribed for the offence, and in some instances, the character, means and status of the accused. In dealing with an application for bail it is also relevant that the Court should consider what are the penal consequences of the act when proved, and what is the nature of the offence charged, and whether the offence charged is or is not a bailable offence. However, it is obvious from a perusal of s. 389 of the Criminal Procedure Code that a Judge has jurisdiction to consider an application under the said section and we agreed with Encik Shafee that the words "in any case" import that the powers of the High Court are unfettered. The High Court has the fullest discretion in the matter when considering the amount of the bond and the words "whether there be an appeal on conviction or not" appearing in the said section gives the Judge very wide powers to admit to bail even where an accused person has been convicted and has not appealed. Therefore where a man convicted has not preferred an appeal bail may be granted pending the filing of the appeal. In this case we would not agree with the learned deputy that the applicant should have filed an appeal under s. 394 of the Criminal Procedure Code and that because he had applied under s. 389 of the said Code, the High Court did not have jurisdiction to entertain it.

We would conclude that the High Court had jurisdiction to entertain the application under s. 389 regarding the amount of bond executed under Chapter XXXVIII of the said Code. But we would also point out that as neither Encik Gooi nor Encik Shafee had addressed us on whether the learned Judge had the power to order the release of the respondent's international passport under s. 389 of the Criminal Procedure Code, that issue is left to be decided on some other occasion after full and relevant arguments by Counsel on both sides.

Also found at [1990] 2 CLJ 8